(3)

No. 03-1456

in the

Supreme Court of the United States

LUIS SPENCER,

Petitioner

v.

ROGER NORTON,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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United States Constitution, Amendment Six

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, Amendment Fourteen

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TEXT OF STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2254 (d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated n the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

REASONS FOR DENYING THE WRIT

The Petition in this case fails to present any conflict between the decision of the Court of Appeals and any decision of this Court. It will be shown below that the decision of the Court of Appeals is entirely consistent with the relevant decisions of this Court and is faithful to the provisions of the governing statute: 28 U.S.C. §2254 (d) (2). The case presents no substantial federal question, implicates none of the considerations set forth in Supreme Court Rule 10, and the case is of interest only to the parties. This is not a case in which the Writ should be granted.

POINT I

SINCE THE COURT OF APPEALS CORRECTLY APPLIED BOTH THE STATUTE AND THIS COURT'S DECISIONS CONSTRUING THE STATUTE, THE PETITION PRESENTS NO BASIS FOR A WRIT OF CERTIORARI

The first issue that the Respondent Spencer presents misstates the opinion of the Court of Appeals. Spencer states the issue as follows:

> Did the First Circuit err in holding that, when a state court summarily denies a *habeas* petitioner's motion for a new trial, which includes a *Brady v. Maryland* claim premised on affidavits, the state court should be deemed not to have ruled on the credibility of the affidavit.

(Pet. Cert. at i). The Court of Appeals made no such holding. What that court held was that "[w]e are unwilling to infer that the trial judge viewed the affiants as incredible when there is nothing in the record, or in the circumstances of this case, to support such an inference." (Pet. App. at 9). Thus, the Court of Appeals based its decision on the record and the facts of the case, and simply found no record or factual support for any inference

of an implicit credibility determination. *Id.* The Court of Appeals did not *deem* anything; it made a record-based decision.

This issue arose in the context of Mr. Norton's motion for a new trial in the state trial court. The motion contained several grounds; however, only the allegation of a *Brady* violation is relevant for purposes of the instant Petition. Mr. Norton argued that the prosecutor withheld exculpatory evidence that Noel Rodriguez, one of tow complaining witness against him, recanted his allegations prior to trial, and told the prosecutor that the remaining complainant, Hector Fuentes, told him he, too, had fabricated his allegations against Mr. Norton. Noel Roadriguez provided an affidavit in support of Norton's motion. (Resp. App. at 1) Noel's mother, Maria Rodriguez provided an affidavit as well. (Resp. App. at 3) Mrs. Rodriguez recounted in her affidavit her son's recanting of his allegations to the prosecutor and his telling the prosecutor about Fuentes' statement. *Id.* She also described her observations of the prosecutor's improper coaching of her son and Fuentes in preparation for trial. *Id.*

The trial court denied the motion and the appeals court affirmed. (Pet. App. at 14 and 24). The trial court made no factual findings and did not mention the affidavits. *Id.* at 24-25. It apparently treated the information in the affidavits as evidence that could have been presented at trial or on direct appeal. (Pet. App. at 2; and 24-25). Spencer argues that the mere denial of the new trial motion, without more, requires a finding that an adverse credibility determination must be implied. (Pet. Cert. at 7-12). Apparently, he believes that *Marshall v. Lonberger,* 459 U.S. 422 (1983) and *LaVallee v. Delle Rose*, 410 U.S. 690 (1973), compel this conclusion. *Id.* Mr. Norton will show below, that Spencer misreads *Marshall* and *LaVallee*, and that the Court of Appeals correctly applied the decisions of this Court.

The point that the Respondent Spencer has failed to grasp throughout this case, is that in order to draw an inference, there must be facts that would support drawing that inference. Both the District Court (Pet. Supp. App. at 16-18), and the Court of Appeals (Pet. App. at 9), expressly found there were no such facts. Neither court rejected the principle of *Marshall v. Lonberger, supra*, that where there are facts supporting an implicit credibility finding by a state court, then a court reviewing an *habeas* petition cannot substitute its judgement for that implicit finding. The Court of Appeals ruled that it was "unwilling to infer that the trial judge viewed the affiants as incredible when there is nothing in the record, or in the circumstances of this case, to support such an inference." (Pet. App. at 9). That is, there were no facts from which to infer that the trial court made any credibility determination, implicit or otherwise. Thus, contrary to the Respondent's formulation of the Question Presented, the Court of Appeals did not hold that when a motion for new trial based on affidavits is denied, "the state court should be *deemed* not to have ruled on the credibility of the affidavits." (Pet. Cert. at i; emphasis supplied). The Court of Appeals held, correctly, that where there is no factual basis for an inference that the state court ruled on the credibility of affidavits, no inference that it did so can be drawn. (Pet. App. at 9).

The Court of Appeals, following the District Court, noted that in deciding the new trial motion, (1) the trial court held no hearing; (2) the trial court made no findings of fact; (3) there was no evidence impugning the credibility of the affiants; and, finally, (4) the record "suggests that the trial court did not evaluate the affidavits, much less that the trial court implicitly found the affidavits to be incredible." (App. at 9-10). The Court of Appeals properly distinguished *Marshall v. Lonberger, supra*, on the grounds that the record in *Marshall* revealed that the trial court had (1) held a lengthy hearing including testimony

by the defendant; (2) there was documentary evidence supporting the inference to be drawn; (3) the trial court could not have made the decision it made, had it believed the defendant. Id. at 432-436.

The issue in *Marshall, supra,* was whether the defendant's prior conviction could be introduced into evidence to prove a specification in an indictment on subsequent charges. The defendant testified at a pre-trial hearing that he had not been advised of the all charges in the prior indictment, specifically, one charge of attempted murder, when he plead guilty to it. *Id.* at 432-433. The indictment clearly contained the charge, the certificate of conviction completed at the time of the plea stated that the defendant was advised of the consequences of his plea, his attorney acknowledge the legal and factual sufficiency of the indictment, and the defendant affirmatively responded to the charge of "attempt on Dorothy Maxwell with a knife ... ." *Id.* at 435-436. Following the hearing, the court, at trial admitted the conviction into evidence. *Id.* at 434. The Court noted that had the trial court believed the defendant, then it could not have allowed the conviction to have been used at trial. *Id.* Thus, in *Maxwell*, the trial court's decision logically subsumed the credibility determination.

In *Lavallee v. Delle Rose*, *supra*, the issue before the Court was whether a federal *habeas* court erred when it conducted a hearing to determine whether confessions introduced in the petitioner's trial were voluntary. A state court had previously held an evidentiary hearing on the same issue and found the confessions to be voluntary. *Id.* at 693-694. The federal courts held that since the state court did not articulate its findings on the petitioner's credibility, *i.e.* whether his account of the interrogation and confessions was accurate, there was no state court ruling on the subject as required by the version of 28 U.S.C. §2254 (d) (1) then in place. This Court reversed, holding that there was no

evidence the state court applied the wrong legal standards, and indeed, the evidence was that the correct standards were applied. *Id.* at 695.

In *LaVallee*, there was a full hearing and the petitioner testified, setting forth the facts as he contended they were. This Court concluded that

> ... we quite agree with the District Court's statement that it could not go along with the state trial court's conclusion of voluntariness if it "were to find the facts to have been as petitioner's [Delle Rose's] testimony portrayed them." (Citations omitted). Under these circumstances, we think the District Court could have been reasonably certain that the state court would have granted relief if it had believed respondent's allegations.

Thus, the rationale of *LaVallee* is precisely the same as in *Marshall v. Lonberger, supra*, that where the decision of a state court, after a hearing, logically subsumes the issue of credibility, a federal *habeas* court should honor that implicit determination.

In contrast, in the instant case, the Court of Appeals correctly read the record as revealing that "there is no indication that the trial court ever viewed or evaluated the affidavits." (Pet. App. at 8). The trial judge held no hearing, there were no documents bearing on the credibility of the affidavits, and he made no ruling which could be found implicitly to have made any such evaluation. (Pet. App. 9-10).. Rather, the trial judge treated the information contained in the affidavits as having been available at the time of trial. The Court of Appeals noted that the trial judge stated in his order that Mr. Norton "... filed a motion for new trial raising the same issues as were raised on the direct appeal or that could have been raised." (App. at 9). A determination by the trial court, if made, that the affidavits did not amount to "new evidence," does not import any credibility determination. The trial judge could have made his decision without passing on the credibility of the affidavits. Thus, the trial court's decision did not subsume within it the issue of credibility. That was the meaning of the Court of Appeals holding that it was

"unwilling to infer that the trial judge viewed the affiants as incredible when there is nothing in the record, or in the circumstances of this case, to support such an inference." (Pet. App. at 9). Moreover, the trial court's statement that the evidence, indisputably unavailable at the time of trial, was not new, was itself indisputably unreasonable and thus was not accorded any deference as provided by 28 U.S.C. §2254 (d) (2). (Pet. App. at 9). Spencer does not contest this holding.[1]

The state appeals court in the instant case, stated that the trial judge "... was not required to accept the [affidavits] as true ... ." (Pet. App. at 10 and 17). It was unclear whether that was a factual reconstruction of the trial court's decision. However, as noted above, there was no record support for a finding that the trial judge made any such decision. (Pet. App. at 9-10). Since the record did not support the state appeals court's reconstruction, if that is what it was, the Court of Appeals correctly declined to accord it any deference. *Id.* at 11; *see, Parker v. Dugger,* 498 U.S. 591, 597 (1982). On the facts established by the record, the Court of Appeals properly concluded that any finding by the state appeals court that a credibility determination was made by the trial court, would be an unreasonable determination of the facts. (Pet. App. 9-10). 28 U.S.C. §2254 (d) (2).

Thus, the Court of Appeals correctly applied 28 U.S.C. §2254 (d) (2), and all relevant decisions of this Court, including *Marshall v. Lonberger, supra.* Spencer does not contest the constitutional propriety of those decisions. Therefore, Spencer has failed to demonstrate that there is any substantial federal question presented in its Petition, or that there is any conflict between the Court of Appeals decision in this case and any decision of this Court. Spencer's Petition for Writ of Certiorari should be denied.

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[1] The Petitioner Spencer does not contest the Court of Appeals and the District Court's findings that the information in the affidavits was not cumulative, but was newly discovered exculpatory evidence.

POINT II

SINCE THE STATE COURT MADE NO RULING ON THE ADMISSIBILITY OF THE INFORMATION IN THE AFFIDAVITS, THE COURT OF APPEALS DECISION DID NOT AND COULD NOT CONFLICT ANY RULING BY THE STATE COURT

Spencer, styles his second Question Presented, as follows:

> Did the first circuit err in holding that *habeas* relief can be granted on the basis of a *Brady v. Maryland* claim premised on affidavits when the state court of appeals has held that the affidavits would, under state law, have been inadmissible at trial in state court?

(Pet. Cert. at i).

First, it is clear that the Court of Appeals made no such holding. (Pet. App. at 12-13, nt. 8). The court explicitly stated that "[t]he state courts never directly addressed whether the material in Noel's or [Ms.]Rodriguez' affidavits was admissible." *Id.* The court went on to note that the Massachusetts Appeals Court characterized Ms. Rodriguez' affidavit as "'one further level of hearsay removed from the allegedly recanting victim,' implying that both affidavits were inadmissible hearsay." *Id.* The Court of Appeals determined, however, that such an implication was not necessary. *Id.*

The fact that Noel Rodriguez' (the recanting complainant) recounting of what Fuentes (the complainant at trial) told him was hearsay, does not make it inadmissible. Hearsay is admissible for a number of reasons, as the Court of Appeals noted. *Id.* Fuentes' statements were admissible as prior inconsistent statements for impeachment purposes. *Id.*, citing *Commonwealth v. Daye*, 393 Mass. 55, 469 N.E. 2d 483 (1984); *accord*, *Commonwealth v. Basch*, 386 Mass. 620 (1982) (judge has no discretion to exclude impeachment through prior inconsistent statement on a material matter). Thus, while the state appeals court may have characterized Noel's affidavit as hearsay, that was not a

ruling as to admissibility. Pursuant to Massachusetts' evidence law, Fuentes' statements to Noel were admissible to impeach Fuentes, despite the fact that they were hearsay. *Id.* Therefore, the Court of Appeals did not "overrule" any evidentiary holding by the state appeals court.

The Massachusetts Appeals Court characterization of Ms. Rodriguez' affidavit as "one further level of hearsay" focussed on that portion of Ms. Rodriguez' affidavit that repeated what Noel had told her about Fuentes. (Pet. App. at 17-18; and 12-13, nt. 8). Ms. Rodriguez' statements as to what her son told her may well have been inadmissible. However, the Court of Appeals correctly ruled that her personal observations of the prosecutor's improperly coaching the witnesses would have been admissible. *Id.* The Massachusetts Appeals Court did not address that portion of Ms. Rodriguez' affidavit. (Pet. App. at 17-18). Thus, the Court of Appeals did not, and could not "overrule" the state court's evidentiary ruling as Spencer asserts. (Pet.Cert. at 13). Spencer's citation to *Puleio v. Vose*, 830 F.2d 1197 (1st Cir. 1987), is inapt. *Puleio* held that a federal court is bound by a state court's interpretation of its evidentiary law. *Id* at 1204. However, in the present case, there was no interpretation of Massachusetts' evidentiary law involved, and the Court of Appeals' decision was entirely in accord with, and cited to Massachusetts law. (Pet. App. at 12-13, nt. 8).

Typically, a reviewing court in a *habeas* proceeding does not review evidentiary errors or state evidentiary rules, *see, Marshall v. Lonberger, supra*. However, when an evidentiary rule or ruling subverts a constitutional right or would render the defendant's trial fundamentally unfair a court is empowered to review such matters. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Crane v. Kentucky*, 476 U.S. 683 (1986). It cannot be gainsaid that the refusal to admit evidence to impeach the state's only witness to alleged

criminal acts would render a trial fundamentally unfair. *See, Banks v. Dretke*, __ U.S. __, 124 S.Ct. 1256 (2004); *Stickler v. Greene*, 527 U.S. 263 (1999); *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Agurs*, 427 U.S. 97 (1976); *Giles v. Maryland*, 386 U.S. 66 (1967); *Alcorta v. Texas*, 355 U.S. 28, 31 (1957); *Mooney v. Holohan*, 294 U.S. 103, 110-112 (1935). In each of the above cases, this Court ruled that withholding evidence which could have been used to impeach a key government witness violated the defendant's Fifth and Fourteenth Amendment due process rights. In *United States v. Giglio, supra*, at 153-154, this Court held that

> [t]he principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule.

The right to cross-examine and to impeach a key government witness also implicates Sixth Amendment concerns. *Davis v. Alaska,* 415 U.S. 308 (1974). This Court stated in *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986), that

> [w]e think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness." *Davis v. Alaska, supra*, at 318.

Therefore, even if the state courts had determined that the critical impeachment evidence (that Fuentes, the remaining complaining witness, had stated that he had fabricated his charges against Mr. Norton) was inadmissible hearsay, the Court of Appeals would have

been empowered by the Constitution and relevant decisions of this Court to reject that determination.

In the present case, the Court of Appeals correctly applied the pertinent decisions of this Court regarding withholding of exculpatory evidence, and ruled that the information in the affidavits was material for *Brady* purposes. (Pet. App. at 12). The court ruled that "[s]uch information is evidence that is clearly favorable to the accused and would have substantially undermined his judgement of guilt if it had been presented at Norton's trial." *Id.* at 12. The court concluded: "... there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome could have been different." *Id.* at 13. Again, the Respondent Spencer has not contested this ruling.

Spencer protests in his Petition for *Certiorari* that the court of appeals improperly based its *Brady* analysis on the "flawed premise that the information in the affidavits was true." (Pet. Cert. at 8 and nt. 1). Spencer miscomprehends the proceedings. The district court ruled that Mr. Norton had met his burden, not just for a hearing, but for *habeas* relief based on the unrebutted character of the affidavits. (Pet. Supp. App. at 28-29). The court had earlier found that, on the record in this case, the affidavits could not be considered as necessarily incredible. *Id.* at 24. Therefore, the court gave Spencer the opportunity to have an evidentiary hearing at which witness could be examined and the prosecutor given the opportunity to rebut the allegations if she could. That offer was rejected. (Pet. Supp. App. at 27-29). Thus, the affidavits stand unrebutted in the record and Spencer's protest is ungrounded.

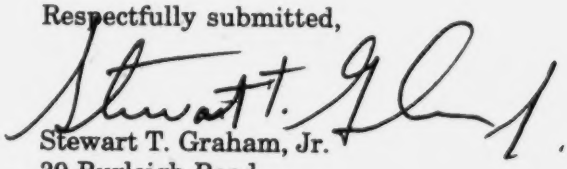
The Court of Appeals would have been justified by 28 U.S.C. §2254 (d) (1), in holding that a state evidentiary ruling excluding material, impeachment evidence would have denied Mr. Norton a fair trial in violation of his right to due process as guaranteed by

the Fifth and Fourteenth Amendments, and would have violated his Sixth Amendment right to confrontation of witnesses. However, since the state appeals court made no ruling regarding admissibility, as demonstrated above, this issue is essentially moot.

CONCLUSION

Mr. Norton prays this Court deny the Petition for Certiorari since it presents no substantial federal question, no conflict between the decision of the Court of Appeals for the First Circuit in this case and the decisions of this Court, and the Court of Appeals decision is entirely consistent with the governing statute, 28 U.S.C. §2254, *et seq.*

Respectfully submitted,



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